No. 02-241, 02-516

IN THE
Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONSOLIDATED BRIEF OF LT. GEN. JULIUS W. BECTON, JR., ADM. DENNIS BLAIR, MAJ. GEN. CHARLES BOLDEN, HON. JAMES M. CANNON, LT. GEN. DANIEL W. CHRISTMAN, GEN. WESLEY K. CLARK, SEN. MAX CLELAND, ADM. ARCHIE CLEMINS, HON. WILLIAM COHEN, ADM. WILLIAM J. CROWE, GEN. RONALD R. FOGLEMAN, LT. GEN. HOWARD D. GRAVES, GEN. JOSEPH P. HOAR, SEN. ROBERT J. KERREY ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	10
THE GOVERNMENT'S COMPELLING NATIONAL SECURITY INTEREST IN A DIVERSE OFFICER CORPS REQUIRES RACE-CONSCIOUS ADMISSIONS POLICIES FOR OFFICER TRAINING PROGRAMS	10
1. Integration of the Military	10
2. Integration of the Officer Corps	13
3. Race Conscious Admissions Programs for Officer Education and Training	18
4. Race Conscious Admissions Are Constitutional	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Haig v. *Agee*, 453 U.S. 280 (1981) 7, 8, 27
Metro Broad., Inc. v. *FCC*, 497 U.S. 547 (1990)... 8, 27
Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265 (1978)..... 5, 28
Sweatt v. *Painter*, 339 U.S. 629 (1950)..... 8, 28
Wittmer v. *Peters*, 87 F.3d 916 (7th Cir. 1996)..... 5, 28
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 8, 27

EXECUTIVE ORDER

Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948)..... 11

RULE

Sup. Ct. R. 37.6 1

LEGISLATIVE HISTORY

Hearings By the House Special Subcomm. on Disciplinary Problems in the U.S. Navy, H.A.S.C. No. 93-13 (1972)..... 16
DoD Appropriations of 1974: Military Personnel: Hearing Before the Subcomm. on the Dep't of Def. of the House Comm. on Appropriations, 93rd Cong. (1974)..... 18
Report by the House Special Subcomm. on Discliplinary Problems in the U.S. Navy, H.A.S.C. Rep. No. 92-81 (1973)..... 15
H.R. Rep. No. 103-357 (1993)..... 24

OTHER AUTHORITIES

Air Force Instruction 36-2706 (Dec. 1, 1996)..... 12, 22
Air Force Policy Directive 36-2 (Oct. 1, 1996)..... 22

TABLE OF AUTHORITIES – continued

Page

Naval Academy Information Program Handbook (2002) 20, 21
Am. Council on Educ., *Service Academy Preparatory Schools Project, Final Report* (June 15, 1993)..... 24
B. Brubaker, *Prepping to Play Football for Navy*, Seattle Times, Apr. 21, 1996 ..... 23, 24
Cadet Command Headquarters, U.S. Army, Scholarship Fact Sheets: 2001 Profiles, *at* http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarship%20information%20TOC/fact%20sheets.htm (last updated Oct. 2, 2002) 26
A. Clymer, *Service Academies Defend Use of Race in Their Admission Policies*, N.Y. Times, Jan. 28, 2003 ..... 19, 20, 22
Dep't of the Army, Pamphlet 600-26, *Army Affirmative Action Plan* (May 23, 1990)..... 12
Dep't of Def., Directive 1350.2 (Aug. 18, 1995)... 12
Dep't of Def., *Population Representation in the Military Services* (Nov. 1998) 18
1 Dep't of Def., *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (Nov. 30, 1972), *reprinted in* 13 *Blacks in the United States Armed Forces: Basic Documents* (M. MacGregor, Jr. & B. Nalty eds., 1977)..... 16
Dep't of Def., Statistical Series Pamphlet No. 02-5, *Semiannual Race/Ethnic/Gender Profile By Service/Rank of the Department of Defense & Coast Guard* (Mar. 2002)..... 6, 7, 12, 17, 22
Dep't of the Navy, OPNAVINST 5354.1E, Equal Opportunity Policy (Jan. 22, 2001)..... 12
Dep't of the Navy, *Navy Affirmative Action Plan* (1991), *enclosed in* Dep't of Navy, OPNAV Instruction 5354.3D (Aug. 29, 1991)..... 12, 20

TABLE OF AUTHORITIES – continued

Page

Dep't of the Navy, SECNAVINST 1531.2A, U.S. Naval Academy Curriculum & Admissions Policy (Feb. 2, 1996) 20

Dep't of Justice, *Review of Federal Affirmative Action Programs, Report to the President* (July 19, 1995) 12, 13, 17, 18

D. Dickerson, *How to Keep Elite Collges Diverse*, U.S. News & World Rep., Jan. 5, 1998 23

P. Grier, *The Case for Academics*, Air Force Mag., July 1993 24

L.M. Hanser & A.E. Robyn, *Implementing High School JROTC Career Academies* (2000) 26

L. Healy, *Learning to Lead*, Military News, June 18, 2001 22

Col. M. Jones, Dir. of Admissions, USMA Admissions: The Corps. Starts Here (2002), *at* http: //www. USMA. edu/ PublicAffairs/ Club Conference02./wppcpres0402.ppt 19

D. Maraniss, *United States Military Struggles to Make Equality Work*, Wash. Post, Mar. 6, 1990 ..... 6, 12, 16

LTC E.J. Mason, U.S. Army War Coll. Strategy Research Project, *Diversity: 2015 and the Afro-American Army Officer* (1998) 6, 7, 16

L. Morris, U.S. Army, CBSP Fact Sheet 02 (Sept. 26, 2002), *at* http://www.rotc.monroe.army.mil/scholarship__HPD/Scholarship%20information%20TOC/fact%20sheets.htm 26

Office of the Assistant Sec'y of Def., *Population Representation in the Military Services: Fiscal Year 2000* (Nov. 2001), *available at* http://www.dod.mil/prhome/poprep2000/html/chapter4/chapter4_3.htm 25

TABLE OF AUTHORITIES – continued

Page

Office of the Undersec'y of Def. Personnel & Readiness, Dep't of Def., *Career Progression of Minority and Women Officers* (1999) ..... *passim*

Gen. Colin Powell, Commencement Address, Bowie State University (1966), *reprinted in* 142 Cong. Rec. S9311 (daily ed. July 31, 1996) 27

President's Comm. on Equal Opportunity in the Armed Forces, *Equality of Treatment and Opportunity for Negro Military Personnel Stationed within the United States* (June 13, 1963), *reprinted in* 13 *Blacks in the United States Armed Forces: Basic Documents* (M. MacGregor, Jr. & B. Nalty eds., 1977) 15

President's Comm. on Equality of Treatment & Opportunity in the Armed Servs., *Freedom to Serve: Equality of Treatment and Opportunity in the Armed Services* (1950), *reprinted in Blacks in the Military: Essential Documents* (B. Nalty & M. MacGregor, Jr. eds., 1981) 14

U.S. Air Force Acad., *2001-2002 Catalog* (2001) 22

U.S. Air Force Acad., Information Sheet (2000) 23

U.S. Coast Guard, College Student Pre-Commissioning Initiative (CSPI), *at* http://www.uscg.mil/jobs/cspi.html (last visited Feb. 4, 2003) 22

U.S. Coast Guard Acad., Diversity & Retention (Oct. 2001), *at* http://www.members.aol.com/_ht_a/lyndahaley/academy/statistics.htm 21

U.S. Coast Guard Acad., MITE: Minority Introduction to Engineering, *at* http://www.cga/edu/admissions/summerprogramforjuniors/mite.htm (last visited Feb. 4, 2003) 21

TABLE OF AUTHORITIES – continued

Page

U.S. GAO, GAO/RCED-94-131, *Coast Guard: Cost for Naval Academy Preparatory School and Profile of Minority Enrollment* (Apr. 12, 1994) 24

U.S. GAO, GAO/NSIAD-94-95, *Military Academy: Gender and Race Disparities* (Mar. 17, 1994) 19, 20

U.S. GAO, GAO/NSIAD-93-54, *Naval Academy: Gender and Racial Disparities* (Apr. 1993) 21

U.S. GAO, GAO/NSIAD-93-244, *Air Force Academy: Gender and Racial Disparities* (Sept. 1993) 22

U.S. GAO, GAO/NSIAD-92-57, *DoD Service Academies: Academy Preparatory Schools Need A Clearer Mission and Better Oversight* (Mar. 1992) 23, 24

USMA Admissions Office, *Academy Getting Ready for Influx of New Cadets* (June 29, 2001), *at* http://www.USNA.edu/PublicAffairs/R//010629/influx.html 19

Letter from George Washington, United States President, to Alexander Hamilton (Sept. 1, 1796), *reproduced in* J. Ellis, *Founding Brothers: The Revolutionary Generation* (2001) 8

R. Worth, *Beyond Racial Preferences*, Washington Monthly, Mar. 1998 23

Adm. E. Zumwalt, Jr., *On Watch* (1976) 15

SCHOLARLY AUTHORITIES

T. Crackel, *West Point: A Bicentennial History* (2002) 19

J. Foner, *Blacks and the Military in American History: A New Perspective* (1974) 16

TABLE OF AUTHORITIES – continued

Page

F.M. Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 Wm. & Mary Bill Rts. J. 273 (2000) 10, 11

M. MacGregor, Jr., *Integration of the Armed Forces 1940-1965* (1980) 11, 14

C. Moskos & J. Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* (1996) ..... *passim*

B. Nalty, *Strength For The Fight: A History Of Black Americans In the Military* (1986) 6, 14, 15, 16, 17

M. Neiberg, *Making Citizen-Soldiers: ROTC and the Ideology of American Military Service* (2000) 17, 25

INTEREST OF *AMICI*

Amici are former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military-academy superintendents, Secretaries of Defense, and present and former members of the U.S. Senate.[1] They are deeply interested in this case, because its outcome could affect the diversity of our nation's officer corps and, in turn, the military's ability to fulfill its missions. *Amici*'s judgment is based on decades of experience and accomplishment at the very highest positions in our nation's military leadership. The responsibilities highlighted below do not begin to describe the full scope of their service.

Lieutenant General Julius W. Becton, Jr. served in the U.S. Army for 40 years. He served five years as president of Prairie View A&M University, and subsequently served as Superintendent of the Washington, D.C. Public Schools.

Admiral Dennis Blair, retired 4-star, served as Commander in Chief, U.S. Pacific Command (1999-2002), where he directed all Army, Navy, Marine Corps and Air Force operations across more than 100 million square miles.

Major General Charles Bolden, retired astronaut and 2-star, was the nation's first African-American Marine astronaut. He flew four space shuttle missions, commanding two, including the mission placing the Hubble telescope into earth orbit.

Honorable James M. Cannon served as Chairman of the U.S. Naval Academy Board of Visitors under Presidents Reagan and George H.W. Bush. (1989-93).

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Lieutenant General Daniel W. Christman, retired Army 3-star, was Superintendent of the U.S. Military Academy (1996-2001), where he had overall responsibility for admissions criteria at West Point.

General Wesley K. Clark served as Supreme Allied Commander, Europe (1997-2000), and Commander in Chief, U.S. Southern Command (1996-97).

Senator Max Cleland served as a combat officer in Vietnam and as Administrator of the U.S. Veterans Administration (1977-81). As U.S. Senator from Georgia (1997-2003), he chaired the Armed Services' Subcommittee on Personnel.

Admiral Archie Clemins, retired 4-star, served as Commander in Chief, U.S. Pacific Fleet (1996-99), the world's largest combined-fleet command.

Honorable William Cohen was the 20th Secretary of Defense (1997-2001). As U.S. Senator from Maine (1979-97), he chaired the Armed Services Committee's Seapower and Force Projection Subcommittee.

Admiral William J. Crowe, retired 4-star, was the 11th Chairman of Joint Chiefs of Staff (1985-89). He also commanded U.S. Naval Forces in the Persian Gulf and NATO Forces in Southern Europe and served as U.S. Ambassador to the United Kingdom (1993-97).

General Ronald R. Fogleman, retired 4-star, was Air Force Chief of Staff (1994-97) with overall responsibility for organizing and training the 750,000 active duty, Guard, Reserve and civilian members. He also served as Commander in Chief of U.S. Transcom (1992-94).

Lieutenant General Howard D. Graves, retired Army 3-star, was Superintendent of the U.S. Military Academy (1991-96), with responsibility for admissions criteria. Since 1999, he has served as Chancellor of the Texas A&M University system.

General Joseph P. Hoar, retired Marine 4-star, served as the Commander in Chief, U.S. Central Command (1991-94).

Senator Robert J. Kerrey received the Congressional Medal of Honor serving in the U.S. Navy SEAL special forces. He served as Nebraska governor (1983-87), U.S. Senator (1989-2001), and is the President of New School University.

Admiral Charles R. Larson, retired 4-star, was Commander in Chief, Pacific Fleet (1990-91), and Commander in Chief, U.S. Pacific Command (1991-94). He was also Superintendent of the Naval Academy (1983-86, 1994-98).

Senator Carl Levin is the Ranking Member of the Senate Armed Services Committee and, until January 2003, chaired that Committee, with oversight responsibilities for the armed services.

Honorable Robert "Bud" McFarlane, a retired Marine Corps officer, was President Reagan's National Security Advisor (1983-85), and also served as Deputy Director of the National Security Council.

General Carl E. Mundy, Jr., retired Marine Corps 4-star, was the Marine Corps Commandant (1991-95), and also served as Marine Corps Director of Personnel Procurement.

General Lloyd W. Newton, retired Air Force 4-star, commanded the Air Education and Training Command, where he was responsible for recruiting, training and educating all Air Force personnel, including the Air Force Recruiting Service, 13 bases, and the Air Force University.

Lieutenant General Tad J. Oelstrom, retired 3-star, was Superintendent, U.S. Air Force Academy (1997-2000), and is currently Director, National Security Program, Kennedy School, Harvard University.

Honorable William J. Perry was the 19th Secretary of Defense (1994-97), Deputy Secretary of Defense (1993-94) and Under Secretary of Defense for Research and

Engineering (1977-81). He is currently a Professor of Engineering at Stanford University.

Admiral Joseph W. Prueher, retired 4-star, served as Commander in Chief, U.S. Pacific Command (1996-99), Commandant of Midshipmen, U.S. Naval Academy, and U.S. Ambassador to China (1999-2001).

Senator Jack Reed is an Army veteran. As U.S. Senator from Rhode Island, he serves on the Armed Services Committee and chairs the U.S. Military Academy Board of Visitors.

Honorable Joseph R. Reeder, the 14th Under Secretary of the Army (1993-97), had oversight responsibility for admission criteria for the U.S. Military Academy and the ROTC programs at our nation's universities.

General H. Norman Schwarzkopf, retired 4-star, served as Commander in Chief, U.S. Central Command (1988-91), and overall Commander of Allied Forces during the Gulf War.

General John M.D. Shalikashvili, retired 4-star, was the 13th Chairman of the Joint Chiefs of Staff (1993-97), and served as Supreme Allied Commander, Europe (1992-93).

General Hugh Shelton, retired 4-star, was the 14th Chairman of Joint Chiefs of Staff (1997-2001). He also served as Commander in Chief, U.S. Special Operations Command (1996-97).

General Gordon R. Sullivan, retired 4-star, served as Army Chief of Staff (1991-95), with overall responsibility for organizing and training over 1 million active duty Guard, Reserve, and civilian members.

General Anthony Zinni, retired Marine 4-star, served as the Commander in Chief, U.S. Central Command (1997-2001), and as Special U.S. Peace Envoy to the Middle East (2002).

SUMMARY OF ARGUMENT

Based on decades of experience, *amici* have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security. The primary sources for the nation's officer corps are the service academies and the ROTC, the latter comprised of students already admitted to participating colleges and universities. At present, the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies. Accordingly, these institutions rely on such policies, developed to comport with this Court's instruction in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

The military has made substantial progress towards its goal of a fully integrated, highly qualified officer corps. It cannot maintain the diversity it has achieved or make further progress unless it retains its ability to recruit and educate a diverse officer corps. This Court and others have recognized that in certain contexts, the government may take race-conscious action not only to remedy past discrimination, but to further other compelling government interests. See *Bakke*; *Wittmer* v. *Peters*, 87 F.3d 916 (7th Cir. 1996) (penological benefits justify consideration of race in selecting correctional officers; collecting similar cases). The rules should not be changed. The military must be permitted to train and educate a diverse officer corps to further our compelling government interest in an effective military.

More than 50 years ago, President Truman issued an executive order ending segregation in the United States armed services. That decision, and the resulting integration of the military, resulted not only from a principled recognition that segregation is unjust and incompatible with American values,

but also from a practical recognition that the military's need for manpower and its efficient, effective deployment required integration. Since that time, men and women of all races have trained and fought together in our armed services, from Korea to Vietnam to Afghanistan. Today, almost 40% of servicemen and women are minorities; 61.7% are white, and the remaining almost 40% are minorities, including 21.7% African-American, 9.6% Hispanic, 4% Asian-American and 1.2% Native American. Dep't of Def. ("DoD"), Statistical Series Pamphlet No. 02-5, *Semiannual Race/Ethnic/Gender Profile By Service/Rank of the Department of Defense & Coast Guard* 4 (Mar. 2002) ("*DoD Report*").

In the 1960s and 1970s, however, while integration increased the percentage of African-Americans in the enlisted ranks, the percentage of minority officers remained extremely low,[2] and perceptions of discrimination were pervasive. This deficiency in the officer corps and the discrimination perceived to be its cause led to low morale and heightened racial tension. The danger this created was not theoretical, as the Vietnam era demonstrates. As that war continued, the armed forces suffered increased racial polarization, pervasive disciplinary problems, and racially motivated incidents in Vietnam and on posts around the world. "In Vietnam, racial tensions reached a point where there was an inability to fight." D. Maraniss, *United States Military Struggles To Make Equality Work*, Wash. Post, Mar. 6, 1990, at A01 (quoting Lt. Gen. Frank Petersen, Jr.). By the early 1970s, racial strife in the ranks was entirely commonplace. B. Nalty, *Strength For The Fight: A History Of Black Americans In the Military* 308-10 (1986). The lack of minority officers substantially exacerbated the problems throughout the armed services. LTC E.J. Mason, U.S. Army War Coll. Strategy

[2] For example, at the end of the Vietnam War, only 3% of Army officers were African-American. Office of the Undersec'y of Def. Personnel & Readiness, *Career Progression of Minority and Women Officers* v (1999) ("*Career Progression*").

Research Project, *Diversity: 2015 and the Afro-American Army Officer* 2-3 (1998). The military's leadership "recognized that its racial problem was so critical that it was on the verge of self-destruction. That realization set in motion the policies and initiatives that have led to today's relatively positive state of affairs." *Id.* at 3.

"It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (internal quotations omitted). The absence of minority officers seriously threatened the military's ability to function effectively and fulfill its mission to defend the nation. To eliminate that threat, the armed services moved aggressively to increase the number of minority officers and to train officers in diverse educational environments. In full accord with *Bakke* and with the DoD Affirmative Action Program, the service academies and the ROTC have set goals for minority officer candidates and worked hard to achieve those goals. They use financial and tutorial assistance, as well as recruiting programs, to expand the pool of highly-qualified minority candidates in a variety of explicitly race-conscious ways. They also employ race as a factor in recruiting and admissions policies and decisions.

These efforts have substantially increased the percentage of minority officers. Moreover, increasing numbers of officer candidates are trained and educated in racially diverse educational settings, which provides them with invaluable experience for their future command of our nation's highly diverse enlisted ranks. Today, among active duty officers, 81% are white, and the remaining 19% are minority, including 8.8% African-American, 4% Hispanic, 3.2% Asian American, and .6% Native American. *DoD Report* at 4. A substantial difference between the percentage of African-American enlisted personnel (21.7%) and African-American officers (8.8%) remains. The officer corps must continue to be diverse or the cohesiveness essential to the military mission will be critically undermined. See *infra* at 17.

In specific contexts, the courts have approved race-conscious action to achieve compelling, but non-remedial government interests. For example, the government's interest in "the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 568 (1990) (same) (citing *Bakke*). *Amici* submit that the government's compelling interest in promoting racial diversity in higher education is buttressed by its compelling national security interest in a cohesive military. That requires both a diverse officer corps and substantial numbers of officers educated and trained in diverse educational settings, including the military academies and ROTC programs. See *Haig*, 453 U.S. at 307; *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950) (students in racially-homogenous classrooms are ill-prepared for productive lives in our diverse society). President George Washington eloquently underscored the vital importance of direct association among diverse individuals in education and in the profession of arms:

> [T]he Juvenal period of life, when friendships are formed, & habits established that will stick by one; the Youth, or young men from different parts of the United States would be assembled together, & would by degrees discover that there was not that cause for those jealousies & prejudices which one part of the Union had imbibed against another part.... What, but the mixing of people from different parts of the United States during the War rubbed off these impressions? A century in the ordinary intercourse, would not have accomplished what the Seven years association in Arms did. [Letter from Pres. George Washington, to Alexander Hamilton (Sept. 1, 1796), *reproduced in* J. Ellis, *Founding Brothers: The Revolutionary Generation* 960-61 (2001).]

The crisis that mandated aggressive integration of the officer corps in the service academies and in ROTC programs is a microcosm of what exists in our society at large, albeit with potentially more severe consequences to our nation's welfare. Broad access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions.

At present no alternative exists to limited, race-conscious programs to increase the pool of high quality minority officer candidates and to establish diverse educational settings for officers. The armed services must have racially diverse officer candidates who satisfy the rigorous academic, physical, and personal prerequisites for officer training and future leadership. It is no answer to tell selective institutions such as the service academies or the ROTC automatically to admit students with a specified class rank, even if such a system were administratively workable and would result in a diverse student body. This one-dimensional criterion forces the admission of students with neither the academic nor physical capabilities nor the leadership qualities demanded by these institutions, damaging the corps and the military mission in the process. The military must *both* maintain selectivity in admissions *and* train and educate a racially diverse officer corps to command racially diverse troops. The device of admitting a top percentage will not simultaneously produce high quality and diversity.

Like numerous selective educational institutions, the military already engages in aggressive minority recruiting programs and utilizes the service preparatory academies and other programs to increase the pool of qualified minority candidates. These important steps are vital to the continuing integration of the officer corps. The fact remains: Today, there is no race-neutral alternative that will fulfill the military's, and thus the nation's, compelling national security

need for a cohesive military led by a diverse officer corps of the highest quality to serve and protect the country.

ARGUMENT

THE GOVERNMENT'S COMPELLING NATIONAL SECURITY INTEREST IN A DIVERSE OFFICER CORPS REQUIRES RACE-CONSCIOUS ADMISSIONS POLICIES FOR OFFICER TRAINING PROGRAMS.

The United States armed forces were ordered to desegregate more than 50 years ago. Today the enlisted ranks are fully integrated, and the military has confronted the absolute imperative of integrating its officer corps in furtherance of the compelling national security interest in an effective military. To that end, the services have programs that consider race *both* in selecting participants who broaden the pool of qualified individuals for the service academies and the ROTC *and* in admission to the service academies and ROTC scholarship programs. Currently, no alternative means to field a fully qualified, diverse officer corps exists. This limited use of race in furtherance of the compelling governmental interest it serves is, accordingly, constitutional.

1. Integration of the Military. African-Americans have fought for the United States in every war. F.M. Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 Wm. & Mary Bill Rts. J. 273, 277 (2000). During peacetime, however, the United States once excluded or limited the number of African-Americans in the military. With the urgent need for manpower occasioned by war, numerical restrictions were lifted, but African-Americans were relegated to racially-segregated units and often to manual labor positions. *Id.* at 279; see also C. Moskos & J. Butler, *All That We Can Be: Black Leadership and Racial*

Integration the Army Way 16-29 (1996); M. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, at 412 (1980).

This situation began to change during World War II, when President Roosevelt revised racial policies for the armed services. Higgenbotham, *supra*, at 286-88. It was, however, President Truman's Executive Order 9981, signed on July 26, 1948, that set the United States military on its path to integration. See 13 Fed. Reg. 4313 (1948). On October 30, 1954, the armed forces announced that the last segregated unit had been abolished. Higgenbotham, *supra*, at 317.

Early on, President Truman's Committee on Equality of Treatment and Opportunity in the Armed Services had made the case that integration was a military necessity and that it would ensure efficiency and combat readiness. See MacGregor, *supra*, at 351-52, 355. "[S]ince maximum military efficiency demanded that all servicemen be given an equal opportunity to discover and exploit their talents, an indivisible link existed between military efficiency and equal opportunity." *Id.* at 355. Indeed, the history of the integration of the armed services demonstrates that integration was driven by the urgent need to recruit and effectively utilize military manpower.

The Army initially resisted President Truman's command to integrate, until heavy casualties and slow troop replacement during the Koean War required that African-American soldiers be assigned to fight with undermanned white units. Moskos & Butler, *supra*, at 30; MacGregor, *supra*, at 433-34. The Marines simultaneously integrated based on the same imperative. MacGregor, *supra*, at 460. The Air Force saw significant gains in efficiency with integration, because "problems of procurement, training, and assignment always associated with racially designated units [were] reduced by an appreciable degree or eliminated entirely." *Id.* at 409. With the move to the All Volunteer Force in 1973, the military necessity of "includ[ing] all Americans in the pool of potential recruits took on added

urgency." Dep't of Justice, *Review of Federal Affirmative Action Programs, Report to the President* § 7.5.1 (1995) ("*President's Report*").

Today, the military is one of the most integrated institutions in America. See, *e.g.*, Maraniss, *supra*, at A01. The modern military judgment is that full integration and other policies combating discrimination are essential to good order, combat readiness, and military effectiveness. DoD Directive 1350 requires the military to formulate, maintain and review affirmative action plans with established objectives and milestones. Dep't of Def., Directive 1350.2 § 4.4 (Aug. 18, 1995). Instruction 1350.2 describes such programs as a "military necessity," critical to "combat readiness and mission accomplishment." Each service, accordingly, has its own regulations and instructions implementing the DoD mandate, and each service has goals for officer accessions. See *Career Progression* at 19.[3]

As of March 2002, of the 1.1 million enlisted in the active duty forces, 61.7% were white, 21.7% African-American, 9.6% Hispanic, 1.2% Native American, 4.0% Asian American, and 1.8% were classified as "other." *DoD Report* at 4. In 1990, 24% of those who fought in Desert Shield/Desert Storm were African-American, and 30% of Army troops were African-American. Moskos & Butler, *supra*, at 35. Plainly, the missions of the United States

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[3] *See also, e.g.*, Dep't of the Navy, *Navy Affirmative Action Plan* (1991) ("*Navy Affirmative Action Plan*"), *enclosed in* Dep't of the Navy, OPNAV Instruction 5354.3D (Aug. 29, 1991) (setting goals for minority officer population and accessions); Dep't of the Navy, OPNAVINST 5354.1E, Equal Opportunity Policy § 4(a) (Jan. 22, 2001) (discrimination "adversely affect[s] good order and discipline, mission readiness, and prevent[s] our Navy from attaining the highest level of operational readiness"); Air Force Instruction 36-2706, at 1 (Dec. 1, 1996) (implementing DoD Instruction 1350.3); Dep't of the Army, Pamphlet 600-26, *Army Affirmative Action Plan* § 2-3 (May 23, 1990) (setting goals for officer accessions based on DoD 1350.3).

military services cannot be accomplished without the minority men and women who constitute almost 40% of the active duty armed forces. Moreover:

> the current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, *success with the challenges of diversity is critical to national security*. Experience during the 1960s and 1970s with racial conflict in the ranks was an effective lesson in the importance of inclusion and equal opportunity. As a senior Pentagon official told us, "Doing affirmative action the right way is deadly serious for us – people's lives depend on it." [*President's Report* § 7.1 (emphasis supplied).]

2. Integration of the Officer Corps. Fully integrated enlisted ranks made integration of the officer corps essential to the effective operation of our military. But, the military did not learn this lesson without first experiencing the dangerous and destructive environment of a racially diverse enlisted corps commanded by an overwhelmingly white officer corps. As a direct result of the lessons learned in the 1960s and 1970s, the military is now fully committed to officer corps integration. And while the armed forces have made remarkable strides in achieving racial integration, the military cannot lose ground. It must continue actively to foster representation of minorities in the officer corps by recruiting the most promising members of minority communities so that the service academies and the ROTC programs can train and educate officers who fulfill our national security requirements.

(a) *The Lesson of History*. Almost as soon as President Truman ordered the integration of the armed forces, some in the military recognized the importance of integrating the

officer corps.[4] After integration, however, the armed forces did not produce a substantial number of minority officers for more than a generation. Both lingering discrimination and the formal educational qualifications for officers precluded quick racial integration of the officer corps. As a result, over time, the armed forces became a racial mix of diverse enlisted ranks commanded by an overwhelmingly white officer corps. In 1962, a mere 1.6% of all commissioned military officers were African-American. Nalty, *supra*, at 313.

The chasm between the racial composition of the officer corps and the enlisted personnel undermined military effectiveness in a variety of ways. For example, military effectiveness depends heavily upon unit cohesion. In turn, group cohesiveness depends on a shared sense of mission and the unimpeded flow of information through the chain of command. African-Americans experienced discriminatory treatment in the military, even during integration, but the concerns and perceptions of African-American personnel were often unknown, unaddressed or both, in part because the lines of authority, from the military police to the officer corps, were almost exclusively white. *Id.* at 228-29; MacGregor, *supra*, at 579-80. Indeed, "communication between the largely white officer corps and black enlisted men could be so tenuous that a commander might remain blissfully unaware of patterns of racial discrimination that black servicemen found infuriating." Nalty, *supra*, at 282.

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[4] For example, in its final report to President Truman, the committee charged with overseeing integration expressed "dissatisf[action] with the small number of [black] officers in the [N]avy," and urged the Navy to increase minority participation in the ROTC and to recruit aggressively in minority communities. President's Comm. on Equality of Treatment & Opportunity in the Armed Servs., *Freedom to Serve: Equality of Treatment and Opportunity in the Armed Services (1950)*, *reprinted in Blacks in the Military: Essential Documents* 275-76 (B. Nalty & M. MacGregor, Jr. eds., 1981).

The military's pre-Vietnam racial problems generally were suppressed during battle (*e.g.*, in Korea). During peacetime, violent incidents were met with attempts to improve military life for African-Americans, but minority representation in the officer corps remained static. For example, in 1963, a special committee appointed by President Kennedy recommended that every military organization appoint an officer with authority to address issues raised by African-American servicemen. President's Comm. on Equal Opportunity in the Armed Forces, *Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States* 27-32 (June 13, 1963) (Initial Report), *reprinted in* 13 *Blacks in the United States Armed Forces: Basic Documents*, item 10 (M. MacGregor, Jr. & B. Nalty eds., 1977) ("*Basic Documents*"). This recommendation proved woefully inadequate. Nalty, *supra*, at 291, 329; Report by House Special Subcomm. on Disciplinary Problems in the U.S. Navy, H.A.S.C. Rep. No. 92-81, at 17,671, 17,690 (1973) ("*Special Subcommittee Report*"). During the 1960s and 1970s, the military experienced a demoralizing and destabilizing period of internal racial strife.

Hundreds of race-related incidents occurred. For example, in the 1960s, racial violence among the Marines at Camp Lejeune was not uncommon. White officers were simply unaware of intense African-American dissatisfaction with job assignments and the perceived lack of respect from the Marine Corps. Nalty, *supra*, at 306-07. In the early 1970s, the Navy endured similar racial violence on board the *Constellation*, the *Kitty Hawk* and the *Hassayampa*. See generally *Special Subcommittee Report* at 17,674-79; Adm. E. Zumwalt, Jr., *On Watch* 217-32 (1976). In each case, the officer corps was caught off guard, unable to bring the situation under control, due to the absence of trust and communication between the predominantly white officer corps and frustrated African-American enlisted men.

Throughout the armed forces, the overwhelmingly white officer corps faced racial tension and unrest. "Fights between black and white soldiers were endemic in the 1970s, an era now remembered as the 'time of troubles.'" Moskos & Butler, *supra*, at 33. "In Vietnam, racial tensions reached a point where there was an inability to fight." Maraniss, *supra*, at A01 (quoting Lt. Gen. Frank Peterson, Jr.). African-American troops, who rarely saw members of their own race in command positions, lost confidence in the military as an institution. Mason, *supra*, at 2-3. And, African-American servicemen concluded that the command structure had no regard for whether African-Americans would succeed in military careers. 1 Dep't of Def., *Report of the Task Force on the Administration of Military Justice in the Armed Forces* 38-48, 59-66 (Nov. 30, 1972), *reprinted in* 13 *Basic Documents*, item 66.[5]

Making matters worse, many white officers had no idea how serious the problem was. "Violence and even death proved necessary to drive home the realization that the various assistant secretaries, special assistants, and even commanding officers had only the faintest idea what the black man and woman in the service were thinking." Nalty, *supra*, at 317. Ultimately, "[t]he military of the 1970s recognized that its race problem was so critical that it was on the verge of self-destruction." Moskos & Butler, *supra*, at 142.

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[5] African-American servicemen were looking for African-American officers both for support and as a visible indication that the military recognized African-Americans as valuable contributors. *Hearings By the House Special Subcomm. on Disciplinary Problems in the U.S. Navy*, H.A.S.C. No. 93-13, at 595 (1972) (testimony of Commander B. W. Cloud); J. Foner, *Blacks and the Military in American History: A New Perspective* 211 (1974) ("[t]he scarcity of black officers intensified black grievances."); *id.* at 223 ("[b]lack servicemen told the [NAACP] ... that if black officers were placed in command positions with white junior officers accountable to them, it would be a major step toward overcoming racial discrimination in the army"); Moskos & Butler, *supra*, at 33 (asking "[w]here was the black officer corps" of the late 1960s and early 1970s).

The painful lesson slowly learned was that our diverse enlisted ranks rendered integration of the officer corps a military necessity. M. Neiberg, *Making Citizen-Soldiers: ROTC and the Ideology of American Military Service* 166 (2000) ("[t]he military came ... to understand that having African American noncommissioned officers ... and regular officers was critical to both the operational efficiency of the military and to the creation of the more just and equal environment that military leaders ... wanted to create"); Nalty, *supra*, at 338 ("[b]y the time the draft ended ... the services had realized that discipline had to be maintained and that councils and committees, although helpful in easing racial tensions and otherwise promoting harmony within a unit, could not shoulder the responsibilities that rightly devolved upon the commander"). "Racial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security." *President's Report* § 7.5.1.

(b) *Current Commitment To Racial Diversity In The Officer Corps.* Spurred by the lessons of the 1960s and 1970s, the armed forces have steadily integrated the officer corps since the end of the Vietnam conflict. In 1973, when the nation instituted its all-volunteer force, 2.8% of military officers were African-American. *Career Progression* at v. By March 2002, 8.8% of officers were African-American. *DoD Report* at 4. The representation of other minorities – Hispanics, Asian Americans and Native Americans – increased at an even faster rate over the same period. Minorities now comprise roughly 19% of all officers. *Id.*

The modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness. "[T]he current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is

critical to national security." *President's Report* § 7.1. The military's continuing, race-conscious efforts to increase the percentage of minority officers have achieved some results, but this progress must continue. See Dep't of Def., *Population Representation in the Military Services* 4-8 (Nov. 1998). Accordingly, the armed forces strive to identify and train the best qualified minority candidates to serve as officers. *Infra* at 18-27. As we show, these efforts include race-conscious recruiting, preparatory, and admissions policies at the service academies and in ROTC programs – efforts that underscore the military's resolve to do what is necessary and effective to integrate the officer corps.

3. Race-Conscious Admissions Programs For Officer Education And Training. Our armed forces therefore have focused their efforts on expanding the pool of qualified minority applicants for the academies and the ROTC – the primary sources for officers. Increases in minority enrollment in these institutions obviously will increase the numbers of highly qualified, minority officers. *Career Progression* at 31. The service academies and ROTC employ limited, race-conscious admission programs and policies, both to expand the pool of minority applicants and to increase the number of minority participants. Moreover, increased minority representation in the officer corps enhances our ability to recruit highly qualified minorities into the enlisted ranks.

(a) *Army.* In 1973, testimony by Army leaders before the House Appropriations Subcommittee confirms that integration of the officer corps was essential to address the Army's race-related turmoil. The witnesses identified "[i]ncreasing the number of minority cadets at [West Point] and in the ROTC program" as a critical component of improving the Army's race relations. *DoD Appropriations of 1974: Military Personnel: Hearing Before the Subcomm. on the Dep't of Def. of the House Comm. on Appropriations*, 93d Cong., 308-09 (1974). The first program that succeeded in increasing minority representation was at West Point. In

1968, there were 30 African-American cadets at the Academy; by 1971, there were almost 100. T. Crackel, *West Point: A Bicentennial History* 238 (2002). The Army's successful integration of West Point continues. In 1993, minorities made up 16.5% of cadets, and the Class of 2005 is 25% minority, including 8% African-American (100 cadets) and 6% Hispanic (70 cadets). USMA Admissions Office, *Academy Getting Ready For Influx of New Cadets* (June 2001), *at* http://www.USNA.edu/PublicAffairs/R//010629/influx.html. Today, there are more than 300 African-American and 150 Hispanic cadets.

In order to integrate itself, and hence the Army officer corps, the U.S. Military Academy has self-consciously attempted "to balance the Corps" and therefore has "develop[ed] goals for each class for desired percentages of scholars, leaders, athletes, women, blacks, Hispanics and other minorities." U.S. GAO, GAO/NSIAD-94-95, *Military Academy: Gender and Race Disparities* 13 (Mar. 17, 1994) ("*USMA GAO Report*"). West Point's Superintendent sets yearly targets for minority admissions. *Career Progression* at 20. As Director of Admissions Colonel Michael L. Jones stated, "'We like to represent the society we come from in terms of the student body's undergraduate experiences. [H]aving a diverse student body allows personal growth in areas where people may not have gotten it otherwise. We want people to understand the society they will defend.'" A. Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003.

The Academy's specific percentage goals for minorities are based upon their "representation in the national population and in the national pool of college bound people, and their representation in the Army." *USMA GAO Report* at 13. See also Col. M. Jones, Dir. of Admissions, *USMA Admissions: The Corp Starts Here*, *at* http://www.USMA.edu/PublicAffairs/ClubConference02./wppcpres0402.ppt (USMA seeking 20-25% minorities). In pursuit of these goals,

"minorities [are] consistently offered admission [to West Point] at higher rates than whites [despite] lower academic predictor scores and lower academic, physical education, and military grades." *USMA GAO Report* at 2. This reflects the Academy's need to extend a greater number of offers to qualified minority candidates to achieve diversity. *Id.* In so doing, the Academy ensures that each minority candidate is highly qualified and has the potential to be an outstanding officer in the Army based on a broad range of factors.

(b) *Navy*. Like West Point, the U.S. Naval Academy aggressively recruits minority applicants and employs a limited race-conscious admissions policy. The instructions implementing the Navy Affirmative Action Plan directed the Navy to achieve "a minority officer inventory of six percent Blacks by end of FY2000, [and] three percent Hispanics by end of FY99." *Navy Affirmative Action Plan* at 10. They set a Significant Action Step of monitoring the "United States Naval Academy (USNA) actions to commission at least seven percent Black Navy officers annually starting with USNA Class of 1994" and ensuring "continued commissioning of at least four percent Hispanic Navy officers annually." *Id.* Additional Instructions issued in 1996 specifically stated that the "Naval Academy admissions procedures must support the primary objectives of selecting candidates who ... [r]epresent women and minorities in appropriate numbers in support of the Equal Opportunity Program of the Department of the Navy." Dep't of the Navy, SECNAVINST 1531.2A, U.S. Naval Academy Curriculum & Admissions Policy 1-2 (Feb. 2, 1996). As Naval Academy Dean of Admissions David Vetter stated, "'We want to build an officer corps that reflects the military services of which we are a part.'" Clymer, *supra*.

Substantial human and financial resources are devoted to recruiting and admitting minority students to the Academy. The *Naval Academy Information Program Handbook* 23-25 (2000) (internal working document) guides Academy-affiliated individuals who recruit high-school students,

making clear that minority recruitment is a high priority. See *id.* at 23-25. Each recruiting region and the admissions office itself has a minority recruitment specialist. Critically, a GAO Report, U.S. GAO, GAO/NSIAD-93-54, *Naval Academy: Gender and Racial Disparities* 8 (Apr. 1993) ("*Naval Academy GAO Report*"), stated:

> The Academy also considers desired class composition of minorities and women in its selection of applicants. The Academy uses the "Chief of Naval Operations' goals" as a basis for establishing targets. Its targets for Blacks are 7 percent and 4 percent for Hispanics, which are the same as for the fleet.... The Academy accepts a greater percentage of women and minorities to allow for attrition and still achieve the Chief of Naval Operations' accession goals.

The *Naval Academy GAO Report* further found that "a higher percentage of minorities who did qualify were admitted to the Academy than their white counterparts" and that "[a]verage success predictor scores were significantly higher for whites than for minorities." *Id.* at 37. The Report therefore concluded that "*[b]ecause of the lower qualification rate of minorities, the Academy makes offers of appointment to the majority of qualified minorities to achieve the Chief of Naval Operations' commissioning goals for minorities.*" *Id.* at 38 (emphasis supplied).[6]

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[6] The Coast Guard has numerous programs to recruit minority applicants, including the Minority Introduction to Engineering Program (a free week-long program for minority students interested in engineering and otherwise eligible for the Academy). U.S. Coast Guard Acad., MITE: Minority Introduction to Engineering, *at* http://www.cga.edu/admissions/summerprogramforjuniors/mite.htm (last visited Feb. 4, 2003). Minorities represent 18% of the Academy's class of 2004. *See* U.S. Coast Guard Acad., Diversity & Retention (Oct. 2001) *at* http://www.members.aol.com/_ht_a/lyndahaley/academy/statistics.htm. In addition, the Coast Guard operates the College Student Pre-Commissioning Initiative, which provides training, tuition and stipends to college students enrolled in historically African-American colleges and universities, Hispanic

(c) *Air Force*. Like other services, the Air Force has adopted a Policy Directive, instructing that "the Air Force will develop affirmative action programs which represent minorities, women, and persons with disabilities at all grade levels, in every employment category and in every major organizational element." Air Force Policy Directive 36-2 ¶ 2 (Oct. 1, 1996). See also Air Force Instruction 36-2706 § 1.1., at 7 (Dec. 1, 1996) (Air Force Equal Opportunity and Treatment Program improves mission effectiveness by combating discrimination and allowing "Air Force members [to] ris[e] to the highest level of responsibility possible").

The admissions policy of the Air Force Academy is set out in its catalog and in U.S. GAO, GAO/NSIAD-93-244, *Air Force Academy: Gender and Racial Disparities* (Sept. 1993) ("*Air Force GAO Report*"). The Academy compiles a list of candidates who meet minimum admission standards and then determines which eligible candidates will receive an offer. See U.S. Air Force Acad., *2001-2002 Catalog* 14 (2001). The *Air Force GAO Report*, at 33, states that "[o]n average, minorities had comparable physical fitness scores but lower academic admissions scores." From 1991-1995, 18% of minority applicants were deemed qualified for admission, compared with 28% of white applicants; but 76% of qualified minority candidates received offers, compared with 51% of white applicants. *Id.* at 35-36. Clearly, then, the Academy has an admissions policy that takes some limited account of race. See *id.* at 37-38 fig. 3.4 (admission score for minority students roughly 3000 points and for white students roughly 3200 points); Clymer, *supra* (quoting associate dean of

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Association of Colleges and Universities schools, and other approved institutions. *See* U.S. Coast Guard, College Student Pre-Commissioning Initiative (CSPI), *at* http://www.uscg.mil/jobs/cspi.html (last visited Feb. 4, 2003). The program is designed to increase minority junior officers in the Guard. *See* L. Healy, *Learning to Lead*, Military News, June 18, 2001. As of March 2002, minority officers constituted 13.7% of the Coast Guard officer corps. *See DoD Report* at 4.

admissions Rollie Stoneman, "'[race] certainly [is] one of any number of factors we consider'").

For 2000, 18% of enrolled students were members of a minority group. U.S. Air Force Acad., Information Sheet (2000) (unpublished) (on file with author).

(d) *Service Academy Preparatory Schools*. The service academy preparatory schools demonstrate both the importance the services place on integrating their officer corps and the race-conscious measures they employ to achieve that urgent need. Each service academy is associated with a federally-funded preparatory academy that is the single most significant source of minority candidates for that academy. See *Career Progression* at 35, 37; Moskos & Butler, *supra*, at 86; U.S. GAO, GAO/NSIAD-92-57, *DoD Service Academies: Academy Preparatory Schools Need A Clearer Mission and Better Oversight* 11 (Mar. 1992) ("*Academy Preparatory Schools GAO Report*"). For example, the Military Academy Preparatory School accounts for 20-40% of African-American students and 20-30% of Hispanic students at West Point, and these students are highly successful after admission. *Career Progression* at 37.[7] See also R. Worth, *Beyond Racial Preferences*, Washington Monthly, Mar. 1998, at 28 ("[b]ecause blacks score on average almost 200 points lower on the SAT than whites, [the Army preparatory school] has become an indispensable pipeline for bringing [blacks] into the officer corps"). Similarly, "[a]bout one-third of the minority midshipmen came from [the Naval Academy Preparatory School]." *Career Progression* at 38. See also B. Brubaker, *Prepping to Play Football for Navy*, Seattle Times, Apr. 21, 1996, at D3.

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[7] Army preparatory school graduates "leave West Point with somewhat lower than average GPAs, but with better ratings on various other leadership measures that military academies prize. And 78 percent of [preparatory school] alumni graduated from West Point in four years, a half-percentage point higher than average." D. Dickerson, *How To Keep Elite Colleges Diverse*, U.S. News & World Rep., Jan. 5, 1998, at 15.

"Almost all Coast Guard students at [the Navy's preparatory school] are minorities." Am. Council on Educ., *Service Academy Preparatory Schools Project, Final Report* 89 (June 15, 1993) ("*Am. Council on Educ. Report*"). Fully one-third of minority cadets at the Air Force Academy attend its preparatory school. P. Grier, *The Case for Academics*, Air Force Mag., July 1993, at 60.

The current mission of the preparatory schools is to prepare minorities, as well as enlisted men, women, and athletes, for the service academies. *Academy Preparatory Schools GAO Report* at 3 (the preparatory schools are important "because they prepare minorities and women for academy admission, and therefore promote diversity in the officer corps"); H.R. Rep. No. 103-357, at 676 (1993) (same). Each preparatory academy uses a race-conscious admission policy.

The Army preparatory school sets specific numeric goals. See *Am. Council on Educ. Report* at 41. Both the Navy and Air Force preparatory schools enroll about 40% minority students. *See* Brubaker, *supra*, at D3 (quoting J. Renard, Naval Academy Dean of Admission, calling the preparatory school "'truly an affirmative action success story'" because "[w]ithout [the prep school] he could not possibly meet Navy goals to boost minority representation at the academy to 29 percent"); *Am. Council on Educ. Report* at 28-29 (the Air Force Preparatory school is roughly 40% minority and is providing 30-50% of minority students at the Academy). The Coast Guard, too, sends students to the Navy's preparatory school to "expand the pool of minorities applying to the Coast Guard Academy." U.S. GAO, GAO/RCED-94-131, *Coast Guard: Cost for Naval Academy Preparatory School and Profile of Minority Enrollment* (Apr. 12, 1994) (the preparatory school has "improved the minority profile" at the Coast Guard Academy which is its "primary purpose").

(e) *ROTC Scholarships*. The ROTC produced 48% of active duty officers as of 2000.[8] Like the service academies, it is considered a prime pathway for a career as a military officer. *Career Progression* at 15, 17. Because Academy classes are small, the armed services initially saw the ROTC as the "obvious solution" to the problems created by the lack of minority representation in the officer corps. Neiberg, *supra*, at 167 (quoting Ben Cassiday, *Report to the AFROTC Advisory Panel* (Sept. 18, 1972)). For minorities, the ROTC continues to be a particularly significant vehicle for increasing representation in the officer ranks. Moskos & Butler, *supra*, at 84.

Like the service academies, the ROTC employs an aggressive race-conscious admissions program. Each service's ROTC program is tasked to meet its service's minority goals for commissioning officers. As a result, the ROTC's recruiting programs and strategies are overtly race conscious. For example, the Air Force "Gold Bar" program uses newly commissioned, minority ROTC graduates full time in an effort to recruit minorities for its ROTC. *Career Progression* at 42. The Navy ROTC tripled the number of African-Americans applying for a scholarship after the Secretary of the Navy set specific goals for minority officer accession in 1993. *Id.* In addition to their targeted recruiting efforts, the ROTC "administer[s] compensatory programs in an attempt to broaden the pool of minority candidates." *Id.* at 31. For example, the Junior ROTC purposefully targets inner city high schools and provides a program to address the special needs of this population as a way to increase the pool of minority officer candidates. *Id.* at 39-40. See also L.M.

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[8] *See* Office of the Assistant Sec'y of Def., *Population Representation in the Military Servs.*, tbl. 4.3 (Nov. 2001), *available at* http://www.dod.mil/prhome/poprep2000/html/chapter4/chapter4_3.htm. This number excludes so-called direct appointments for professionals (medical and legal professionals and clergy).

Hanser & A.E. Robyn, *Implementing High School JROTC Career Academies* (2000).

To obtain an ROTC scholarship, a candidate must be admitted to the hosting college or university. The pool of minority candidates at any given ROTC member institution is thus limited to the number of minority students admitted. In addition, the military services issue regulations that determine the number of scholarships allotted to each school (although there are a certain number of scholarship recipients not included in any school's allocation). See L. Morris, U.S. Army, CBSP Fact Sheet 02, ¶ 2 (Sept. 26, 2002), *at* http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarship%20information%20TOC/fact%20sheets.htm. To increase the number of minority ROTC participants, the ROTC makes substantial numbers of scholarships available at historically African-American colleges and universities ("HBCUs") and at institutions with high Hispanic enrollment ("HMIs"). *Career Progression* at 34, 94. This allocation, by itself, ensures that a certain percentage of ROTC scholarships will be awarded to minority college students.

The program's limited race-conscious policies are also reflected in the gap between the SAT scores of minority scholarship recipients and average scholarship recipients. For example, the mean SAT score of recipients in 2001 was 1236 with an average high school GPA of 3.6, compared to the mean SAT score for HBCU scholarship recipients of 920 and average high school GPA of 2.9. See Cadet Command Headquarters, U.S. Army, Scholarship Fact Sheets: 2001 Profiles, figs. 1-2, *at* http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarhip%20information%20TOC/fact%20sheets.htm (last updated Oct. 2, 2002). See also Moskos & Butler, *supra*, at 84.

The U.S. military's collective judgment is perhaps best summed up by General Colin Powell, in confirming his strong support for affirmative action: "In the military, we .... used Affirmative Action to reach out to those who were qualified,

but who were often overlooked or ignored as a result of indifference or inertia." Commencement Address, Bowie State University (1996), *reprinted in* 142 Cong. Rec. S9311, S9312 (daily ed., July 31, 1996).

4. Race Conscious Admissions Are Constitutional. The race-conscious admissions policies at the service academies and in the ROTC program serve compelling governmental purposes and are narrowly tailored to serve those purposes. Limited race-conscious admissions policies at civilian universities are constitutional for the same reason.

This Court and others have recognized that in certain contexts, race-conscious action that furthers compelling, non-remedial government interests is constitutional. The government's interest in racial diversity in higher education is compelling and supports the use of racial considerations in furthering that interest. *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part); *Metro Broad., Inc.*, 497 U.S. at 568 (same) (citing *Bakke*). Because racial diversity in higher education also is necessary to integrate the officer corps and to train and educate white and minority officers, it is essential to ensuring an effective, battle-ready fighting force. This is indisputably a compelling government interest. "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307 (internal quotations omitted).

As noted, the service academies and the ROTC are the primary sources of our officer corps, including those in the highest ranks. Entry through these avenues gives an officer a relative advantage for promotion and assignment. *Career Progression* at 25; *id.* at 62-63 ("minorities from selective colleges have significantly higher performance ratings" on officer reviews than their cohorts from less selective colleges). History has proven that these institutions must provide substantial numbers of minority officers for the services to field the diverse corps that is essential to military efficiency and effectiveness. Indeed, just as compelling

public safety and penological benefits justify consideration of race in the selection of police and correctional officers, even more compelling considerations of national security and military mission justify consideration of race in selecting military officers. Cf. *Wittmer*, 87 F.3d at 920.

Integration of the service academies and the ROTC also provides white and minority officers with the training and educational experience necessary to lead enlisted ranks that are 40% minority. In this connection, ROTC officer candidates are selected from those *already admitted* to host colleges and universities. These institutions must have sufficient minority enrollment so that their ROTC programs can, in turn, train and educate substantial numbers of qualified minority officers and provide officer candidates with a racially diverse educational experience. The military employs ROTC programs at HBCUs and HMIs to recruit high quality minority applicants in sufficient numbers, but preparing officer candidates for service, let alone *command*, in our racially diverse military is extraordinarily difficult in a racially homogenous educational setting. To paraphrase *Sweatt*, a future officer's most effective training and education cannot take place at an institution "in isolation from the individuals and institutions" that he or she will command. 339 U.S. at 634. "[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 312-13 (Powell, J., concurring) (quoting *Keyishan* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).

The crisis that resulted in integration of the officer corps is but a magnified reflection of circumstances in our nation's highly diverse society. In the 1960s and 1970s, the stark disparity between the racial composition of the rank and file and that of the officer corps fueled a breakdown of order that endangered the military's ability to fulfill its mission. That threat was so dangerous and unacceptable that it resulted in immediate and dramatic changes intended to restore minority

enlisted ranks' confidence in the fairness and integrity of the institution. In a highly diverse society, the public, including minority citizens, must have confidence in the integrity of public institutions, particularly those educational institutions that provide the training, education and status necessary to achieve prosperity and power in America.

There is presently no workable alternative to limited, race-conscious programs to increase the pool of qualified minority officer candidates and establish diverse educational settings for officer candidates. Plainly, as respondents' briefs show, the alternative proposed by the United States – admission of students who achieve a specified class rank – is no alternative for private universities and colleges or for graduate schools or for any public institution with a national student body.

Equally to the point, the armed services must have racially diverse officer candidates who *also* satisfy the rigorous academic, physical, and personal prerequisites for officer training and future leadership. It is no answer to tell selective institutions, such as the service academies or the ROTC, automatically to admit students with a specified class rank, even if such a system were administratively workable. This lone criterion mandates the admission of students unable to satisfy the academic, physical, and character-related demands of the service academies or the officer training curriculum. Moreover, even if the pool of minority ROTC candidates remains quantitatively stable, such a policy will reduce the number of high quality minority candidates for ROTC scholarships. Minority candidates are not fungible in the way the government's proposed alternative suggests.

In the interest of national security, the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting. It requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. Like our military

security, our economic security and international competitiveness depend upon it. An alternative that does not preserve both diversity and selectivity is no alternative at all.

Nor does telling the military to work harder to recruit high quality minority candidates make sense. Each service already has numerous aggressive minority recruiting programs and expends significant funds and human resources on service preparatory academies and other programs in efforts to increase the pool of qualified minority candidates. As the growing percentage of minority officers reveals, the military services are making substantial progress toward diverse, highly qualified leadership – progress envied by other institutions in our society. That progress must be protected and must continue. The admissions policies of the service academies and the ROTC reflect a collective military judgment – that the carefully tailored consideration of race in the admission and training of officer candidates is essential to an integrated officer corps and hence to our fighting force. Today, there is no race-neutral alternative that will fulfill the military's and the nation's compelling need for a diverse officer corps of the highest quality to serve the country.

CONCLUSION

The court of appeals' decision that racial diversity in higher education is a compelling state interest should be affirmed.

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